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No. 81-89

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

against

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the trial court's submission to respondent's sentencing jury of a statutory aggravating circumstance later held to be unconstitutional creates an unacceptable risk that his jury—which expressly designated that circumstance in its verdict calling for a death sentence—may have rested its sentencing decision in part upon an constitutionally invalid ground.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 631 F.2d 397 and appears in the Joint Appendix at J.A. 74. The opinion of the Court of Appeals on petition for rehearing is reported at 648 F.2d 446 and appears at J.A. 95. The opinion of the United States District Court for the Middle District of Georgia is unreported and appears at J.A. 67.

The opinion of the Georgia Supreme Court upon respondent's direct appeal from his conviction and death sentence is reported as *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261

(1976), and appears at J.A. 39. The opinion of the Supreme Court of Georgia in state postconviction proceedings is reported as *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), and appears at J.A. 45.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on November 26, 1980. An amended opinion was filed on June 18, 1981. Petitioner filed a timely petition for certiorari which this Court granted on October 5, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

This case also involves the following statutes of the State of Georgia:

Ga. Code Ann. §26-3102

> "Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict

includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § *27-2534.1(b)*

"In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

* * * * * *

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

* * * * * *

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."

Ga. Code Ann. §*27-2534.1(c)*

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed."

STATEMENT OF THE CASE

Omissions in petitioner's statement require us to set forth a full statement of the case on behalf of respondent Stephens. See Rule 34.2

1. The Crime

Alpha Stephens was tried in the Superior Court of Bleckley County for the murder of Lucian Roy Asbell (Tr. T. 1).[1] The State presented evidence to show that, on August 19, 1974, Stephens was being held in the Houston County Jail awaiting trial for an escape from a work camp (Tr. T. 117, 194, 214),

[1]Each reference to the transcript of Stephens' trial, held in the Superior Court of Bleckley County on January 20-21, 1975, will be indicated by the abbreviation "Tr. T." followed by the number of the page on which the reference may be found.

when he escaped a second time with two other inmates (Tr. T. 117, 194, 214). The trio stole an automobile in the vicinity of the jail (Tr. T. 117-118, 194-95, 214) which they abandoned several blocks away (Tr. T. 214). They then hitchhiked to Macon, Georgia, where Stephens went to the home of his sister (Tr. T. 118, 196, 214). Stephens soon met a friend, Claude Sampson,[2] and the two began to drink beer and to consume illegal drugs (Tr. T. 118). During the next two days, while under the influence of drugs (Tr. T. 119, 196),[3] Stephens and Sampson committed two auto thefts, an armed robbery, and several burglaries (Tr. T. 119-20, 197-98, 215-16).

During the morning of August 21, 1974, Stephens and Sampson went to the home of Charles Asbell in nearby Twiggs County. After ascertaining that no one was at home (Tr. T. 199, 200), the two broke into the house and began to remove a number of rifles, shotguns and other items which they found inside (Tr. T. 120, 199, 217). After placing the weapons and other property in their automobile, they attempted, without success, to start the engine (Tr. T. 120).

Suddenly Roy Asbell, the father of homeowner Charles Asbell (Tr. T. 56), pulled into the driveway behind their automobile (Tr. T. 120, 199, 217). Asbell, a 48-year-old farmer and building contractor[4] called out "Nigger, what are you doing in my house" (T. 120; see Tr. T. 199, 217).

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[2]Sampson is referred to throughout the trial transcript by an alias, "Claude Kellog" (Tr. T. 215).

[3]According to the testimony of Savannah City Detective John Goode, Stephens reported that "he and Claude Sampson used various drugs and [were] quite high" (Tr. T. 196) during this period.

[4]Asbell was approximately 5'6" in height and weighed 155 to 160 pounds (Tr. T. 56). According to his son, Asbell had been in a tractor accident six months earlier, had not yet fully recovered from the accident, and consequently walked with a limp (Tr. T. 57).

Stephens told police that, at this, he became "infuriated" (Tr. T. 120, 199), approached Asbell and hit him several times (Tr. T. 217). Asbell in turn drew a .38 Derringer from his pocket (Tr. T. 315), but before Asbell could fire the weapon, Stephens disarmed him (*id.*), hitting him several times and knocking him to the ground (Tr. T. 120, 199). Asbell then pleaded with Stephens, "Don't kick me. Don't hurt me" (Tr. T. 199; see Tr. T. 120), and offered him several hundred dollar bills (*id.*). Stephens took the money, knocked Asbell back into his car using a .357 Magnum he had taken from the Asbell home, and then tossed the weapon to his companion, Claude Sampson (Tr. T. 121).[5]

After unsuccessfully attempting to start their car, Stephens and Sampson left with Roy Asbell in his Ford Ranchero, Claude Sampson holding the .357 Magnum on Asbell (Tr. T. 121, 201, 217) while Stephens drove (*id.*). They drove two or three miles to a pasture just over the Bleckley County line. According to Detective John Goode,

> "Stephens stated at this point that they got the old man out of the car and were going to carry him across the fence and tie him up in the woods and leave him. [Stephens] told me that [Asbell] broke and ran and that he ran into an old house nearby that had hay stored in it . . . ."

(Tr. T. 121).

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[5]Both the *amicus curiae* brief of The Washington Legal Foundation ("WLF Br.") and that of several Attorneys General ("Atty. Gen. Br.") assert that Stephens "pistol-whipped Asbell, inflicting a broken jaw and several skull fractures" (Atty. Gen. Br. at 4; WLF Br. at 4). The record does not support these assertions. Medical Examiner Richard Smith testified without contradiction that the fractures of Asbell's skull "were such as you find when a high powered bullet enters the skull" (Tr. T. 46) and that, while he could not ascertain the precise cause of Asbell's broken jaw (Tr. T. 50-51), it "was in the vicinity of one of the [bullet] entrance wounds" (Tr. T. 50) and might have been attributed to the impact of the bullet (Tr. T. 49-50).

Two different versions of the events that followed are found in the trial record. The more damaging version appears in Stephens' typewritten statement to police officers,[6] which the State introduced during the guilt phase of the trial.[7] Here Stephens said that after he followed Asbell into the house, Asbell confronted him with a metal stick (Tr. T. 121, 201, 218). He shot Asbell through the ear "three or four times"[8] at point blank range with the .357 Magnum (Tr. T. 201-02, 218).[9]

Following the shooting, Stephens and Sampson fled in Asbell's car to Savanah, Georgia, arriving later that afternoon (Tr. T. 122, 202, 218). Stephens bought drugs from a local

[6]Stephens denied that the signature on this typed statement was his, and testified that he did not remember making any such statement. His discussion of events surrounding his interrogation by Savannah, Georgia police appears at p. 10 *infra*.

[7]As respondent explains more fully below, see pp. 11-12 *infra*, Stephens' attorneys never spoke with their client prior to trial (Tr. T. 8-13), and it is not clear whether his attorneys were even aware of Stephens' account of the crime prior to the time Stephens took the stand during the sentencing phase. His testimony about the events surrounding the crime (note 20 *infra*) was not placed before his jury during the guilt or innocence phase.

[8]Medical evidence offered by the State established, however, that Asbell was shot twice (Tr. T. 46). After a thorough search, only one bullet was recovered by police at the scene (Tr. T. 52-55).

[9]The second version of the events surrounding the crime, in which Stephens denied shooting Asbell and placed the murder weapon in Sampson's hands at the time of the shooting, appears in note 20 *infra*. The State's evidence reveals that the day prior to Asbell's murder, Stephens and Sampson robbed a gasoline station in Twiggs County. During the robbery, Sampson, wielding a pistol, ordered a woman customer not to move, and when she disobeyed, shot at her. Stephens "begged [Sampson] . . . not to hurt her" (Tr. T. 151) and took the woman and a man outside where he turned them loose as he and Sampson left the scene (Tr. T. 215).

dealer (Tr. T. 122, 202), checked into a Savanah hotel, and spent the night with a friend whom he later accompanied home in a cab in the early morning hours (Tr. T. 122-23, 203, 218).

2. Stephens' Arrest and Interrogation

About 6:00 a.m., August 22, 1974, a Savannah Police Detective, H.F. Frye, found Stephens asleep on a bench at a bus stop (Tr. T. 91). As Stephens stood up, a .357 Magnum, later shown to have been the weapon stolen from the Asbell home (Tr. T. 63, 92), fell to the ground (Tr. T. 91). Officer Frye, who testified that he "could smell alcohol on [Stephens'] . . .breath," arrested him for being "drunk on the street," for carrying a concealed weapon, and for other violations (Tr. T. 156).

Several hours after his arrest, Stephens was interviewed by Detective John R. Goode, who obtained a number of inconsistent oral and written statements from him during the morning and early afternoon of August 22-23, 1974 (Tr. T. 108-09, 113-14, 115-17, 118-21, 127).[10] Detective Goode acknowledged that it "appeared to me that he had been on a

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[10]Detective Goode testified that he read Stephens his *Miranda* rights on Thursday morning, August 22, 1974, at the outset of his initial interview, and that Stephens read them back to Detective Goode (Tr. T. 107-08, 135). According to Detective Goode, he did not obtain a written waiver of rights from Stephens on Thursday, August 22 (Tr. T. 136), nor did he obtain such a waiver during his second interview at 9:00 a.m. on Friday, August 23 (Tr. T. 137-38). Only during his third interview, conducted at about 10:30 a.m. on Friday, August 23, after Stephens had been brought for the first time to a detective's cubicle and handcuffed to a chair (Tr. T. 139-40), did Stephens agree to sign a waiver form (Tr. T. 140).

pretty good drunk," or that he "might have been coming off" of some "downers" or barbituates (Tr. T. 132), but Goode denied that Stephens was still intoxicated (*id.*). Goode testified that, during his interviews, Stephens acted strangely and appeared "demented in some way."[11]

Stephens testified that he had taken "Purple Haze," a drug composed of acid or uppers, about an hour prior to his arrest, and that earlier during the evening had taken Triunal, smoked marijuana and drunk champagne and beer (Tr. T. 159,

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[11]Tr. T. 150. (The text of this testimony appears in the third indented passage below.)

Goode first testified that Stephens

> "was sitting there in our office and the gleam and glitter in his eyes was out of the ordinary."

(Tr. T. 120.) Stephens' erratic demeanor persisted during the August 23 interviews, especially during his account of the abduction of Asbell:

> "At this time — we couldn't control Stephens at this time at all.
>
> Q. What do you mean, control him?
>
> A. Well, sir, his reactions — he — his eyes — the gleam and glitter in his eyes — it appeared that he was having illusions [sic] of grandeur or something. It was just like he was reacting the [sic] the crime and so forth. He was beginning to get violent, but fortunately we had him handcuffed and so forth. It was frightening to watch him when he was in this state of mind, the way he was explaining it to us."

(Tr. T. 121-122.) At another point, Detective Goode remembered that Stephens was

> "sitting in the chair with his hands like this handcuffed to the table leg he was clenching his hands with the handcuffs on [so] that the veins and so forth in his arms got real large so that the handcuffs were tight on his arms. His eyes were real glassy and fixed. He appeared to be a man who in my opinion was demented in some way. I asked him if the handcuffs were too tight and he didn't even hear me. He didn't seem to know that we were even in the room."

(Tr. T. 150.)

162).[12] He did not recall making the series of oral and written statements attributed to him (Tr. T. 162, 173), and specifically denied that the signature affixed to the typewritten statement was his own (Tr. T. 173).[13]

3. The Bleckley County Indictment[14]

(a) The Guilt Phase

Stephens was indicted in November, 1974 in Bleckley County for the murder of Roy Asbell. He pleaded not guilty and stood trial in January, 1975. At the outset of his trial,

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[12]He stated that he vomited repeatedly in his cell at the Savannah Police Station and requested medical attention, although none was provided (Tr. T. 172).

[13]He also did not recall receiving any *Miranda* warnings from officers (Tr. T. 162). The trial court eventually ruled that Stephens' statements were voluntary, with a qualification that "[p]ossibly if the statements that were made were all made immediately upon arrest I might find that intoxication and use of drugs would have something to do with it, but I think the period of interrogation here and the period within which the statements were made clearly indicate that he was no [sic] under the influence of anything when the written statement was made and when the oral statement to Detective Goode that he testified about were [sic] made." (Tr. T. 177-78.)

[14]On October 17, 1974, Stephens appeared in the Superior Court of Twiggs County, Georgia, and pleaded guilty to motor vehicle theft, armed robbery, burglary, and kidnapping with bodily injury for his part in the crimes involving Roy Asbell (see J.A. 4-5, 46). He received three consecutive life sentences and other lesser sentences as punishment for his role in those crimes (J.A. 69). Stephens contended below that his subsequent indictment in Bleckley County for the same criminal transaction concerning which he had pleaded guilty and been sentenced in Twiggs County violated the Double Jeopardy Clause of the Fifth Amendment (J.A. 62-64). The District Court (J.A. 70-72) and the Circuit Court (J.A. 76-81) rejected this claim.

Hugh Lawson, one of his appointed two attorneys, announced to the court that

> "our defense here is handicapped by the fact that we are evidently altogether out of communication with the defendant himself. He will not communicate with us meaningfully and does not seem to respond meaningfully to any communication that we make to him."

(Tr. T. 8.)

The attorneys stated that they had sought to speak with Stephens on only two occasions prior to the trial (Tr. T. 10), first at the Georgia State Prison in Reidsville, Georgia, and a second time prior to Stephens' commitment hearing in Cochran, Georgia (Tr. T. 11):

> "He did not communicate with us when we did try to communicate with him at Reidsville, and he did not communicate with us at the court house in Cochran, and he will not communicate with us today. I don't know what else to say or do about it."

(Tr. T. 11.)

The trial court, noting that Stephens had been given an opportunity to obtain private counsel, urged Stephens to cooperate with his lawyers, and proceeded with the trial (Tr. T. 13). Later the trial judge stated for the record that although at the time Stephens initially appeared before the court, the judge

> "undertook to explain his rights to an attorney, the nature of the charge and his rights in general to him Mr. Stephens would not respond to anything that [the judge] . . . said to him at that time in the court room. He remained silent. The Court did not know precisely what to make of this, and through officers of the Court inquired whether it might not be well to have psychiatric or other examination of Mr. Stephens, not knowing the nature of the problem, and it was brought to my attention

> that there were times when he was quite affable and talkative and other times when he would not talk at all and that there did not seem to be any mental difficulties at all. It was at this point, and this had been just a matter of a few hours or at best a day or two, the Court made a decision . . . to go ahead and appoint attorneys."

(Tr. T. 99.)

During the guilt phase, the State offered as its principal evidence the testimony of those who had found Asbell's body (John Anthony, Tr. T. 15-30; Sheriff Edward Coley, Jr., Tr. T. 30-42) and those who conducted the medical examination (Dr. Richard Smith, Tr. T. 42-51), the ballistics search (Deputy Sheriff Charles Cranford, Tr. T. 51-56; Agent Joe White, Tr. T. 248-58) and the fingerprint examination (Agent Tony Rainey, Tr. T. 80-89). The State also presented the Savannah police officers who arrested (Det. H.F. Frye, Tr. T. 89-96) and interviewd Stephens (Det. John Goode, Tr. T. 104-152; 179-248). Detective Goode read Stephens' typed statement to the jury (Tr. T. 214-18), and Charles Asbell identified the .357 Magnum taken from Stephens in Savannah as the pistol stolen from his home (Tr. T. 258-63). The State then established that this pistol had been used to shoot Roy Asbell (Agent Kelly Fite, Tr. T. 263-71).

Stephens' trial attorneys offered no evidence on Stephens' behalf (Tr. T. 287). The jury returned a verdict of guilty of murder (Tr. T. 313).

(b) The Sentencing Phase

During the sentencing phase of Stephens' trial, the State sought to establish four statutory aggravating circumstances under Ga. Code Ann §27-2534.1(b):

(i) that the murder had been committed by a person "with a prior record of conviction for a Capital felony" (J.A. 18);[15]

(ii) that the murder was committed by a person "who has a substantial history of serious assaultive criminal convictions" (*id.*);[16]

(iii) that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" (*id.*);[17] and

(iv) that the murder "was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement" (J.A. 18-19).[18]

To support its aggravating circumstances, the State offered the record of eight prior convictions (J.A. 3), six of which were eventually admitted into evidence by the trial court (J.A. 12).[19] The State offered no additional evidence (J.A. 12).

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[15]Ga. Code Ann §27-2534.1(b)(1).

[16]Ga. Code Ann. §27-2534.1(b)(1).

[17]Ga. Code Ann. § 27-2534.1(b)(7).

[18]Ga. Code Ann. §27-2534.1(b)(9).

[19]The convictions before the jury, all on pleas of guilty entered in the Superior Court of Twiggs County, consist of two counts of armed robbery, five counts of burglary, and one count of murder (J.A. 25-38).

Stephens took the stand in his own defense and testified that he had not himself shot Roy Asbell and that he regretted Asbell's death (J.A. 13-17).[20]

Following closing arguments,[21] the trial court charged Stephens' jury on the statutory principles which were to guide its sentencing deliberations (J.A. 18-19). The jury was instructed: (i) that it was authorized to consider all the evidence received throughout the trial, specifically "all facts and circumstances presented in extinuation [sic], mitigation

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[20]Stephens testified that his original intention at the pasture site was to tie Asbell up and leave him (Tr. T. 216). However, Asbell escaped when Stephens "got out of the car . . . [and] stumbled in the ditch" (Tr. T. 316) (Stephens explained that he was "pretty high. Both of us was pretty high" (*id.*).) Stephens then told the jury:

> "[Sampson] . . . asked me did I want to go after him. I said, 'No, let him go.' I said, 'By the time he can get somewhere and call the police we can be about four or five miles down the road, at least to Dublin,' He said, 'No, we had better get him.' So we walked on across the field and went into the house. I didn't have the gun. I gave [Sampson] . . . the gun before we left the [Asbell] house. So we walked up on the front porch, and when we opened the door he backed up, and then he went in. I was coming up the steps, and I heard two shots. I turned around on my heel and went back down the steps. . . . As far as the man getting killed, I'm sorry about that. I ain't going to tell you no lie. If I could bring him back, I probably would, but that I can't do. There ain't nothing I can do about it. If I had shot him, I would say I shot him. I would tell you or anybody else I shot him if I did. So whatever you all come up with is all right with me. I know I deserve to be punished."

(Tr. T. 316-17.)

[21]Neither the closing arguments of counsel nor the *voir dire* examination of Stephens' jury were transcribed. Respondent urged below that the State's failure to record these proceedings violated his "rights under the Eighth and 14th Amendments not to be deprived of his life except upon due process of law and except in proceedings not influenced by arbitrary and capricious considerations" (J.A. 64). The District court (J.A. 72) and the Court of Appeals (J.A. 81-87) rejected this claim.

and aggravation of punishment;" (ii) that the two statutory sentence options were death or life imprisonment; (iii) that "the jury [should] consider any mitigating circumstances or aggravating circumstances authorized by law;" (iv) that the statutory aggravating circumstances included a prior conviction for a capital felony, a substantial history of serious assaultive criminal convictions, an outrageously or wantonly vile offense, or a murder committed by a person who had escaped from lawful custody; (v) that the statutory aggravating circumstances were "stated in writing and [would] be out with you during your deliberations;" (vi) that "[u]nless one or more of these statutory aggravating circumstances [were] . . . proven beyond a reasonable doubt [the jury would] . . . not be authorized to fix punishment at death;" (vii) that if it determined to impose death, it should "recite in the exact words which" the trial court had provided "the one or more circumstances [it] . . . found to be proven beyond a reasonable doubt;" (viii) and that if, on the other hand, it recommended mercy for the defendant, no recitation of mitigating or aggravating circumstances would be required (J.A. 18-19).[22]

The jury returned a verdict recommending the death penalty and expressly finding three aggravating circumtances: (i) a prior record of conviction for a capital felony; (ii) a substantial history of serious assaultive criminal convictions; and (iii) a prior escape from lawful custody (J.A. 23).[23]

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[22]Stephens alleged below that this charge was constitutionally deficient since his jury was not clearly instructed either on the proper role of mitigating circumstances in its deliberations or on its freedom to impose a life sentence even if one or more aggravating circumstances were found (J.A. 64). The District Court (J.A. 73) and the Circuit Court (J.A. 87-88) rejected this claim.

[23]Since the Georgia statute does not require the sentencing to specify whether any mitigating circumstances are found, the record does not reflect whether Stephens' jury accepted his testimony that Claude Sampson killed Roy Asbell.

4. The Direct Appeal

Stephens appealed his conviction and death sentence. Prior to its decision of his appeal, the Supreme Court of Georgia held, in *Arnold v. State*, 236 Ga. 534, 542, 224 S.E.2d 386, 391 (1976), that the aggravating circumstance defined by Ga. Code Ann. §27-2534.1(b)(1) as "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty" and was therefore "unconstitutionally vague." Although Stephens had not asserted this claim in his own appeal, the Supreme Court of Georgia expressly considered the impact of *Arnold* upon his case. It noted that in *Arnold*, the defendant's substantial history of serious assaultive behavior "was the sole aggravating circumstance found by the jury," and it held that, in *Stephens*, since "the evidence supports the jury's findings of the other statutory aggravating circumstances . . . the sentence is not impaired" (J.A. 42). *Stephens v. State*, 237 Ga. 259, 262, 227 S.E.2d 261, 263 (1976).

5. The State Habeas Corpus Proceeding

In his petition for a writ of habeas corpus filed in the Superior Court of Tattnall County, Stephens asserted that his death sentence violated the Eighth and Fourteenth Amendments because it was based in part upon his jury's finding of an unconstitutional statutory aggravating circumstance. The Superior Court rejected his claim, as did the Supreme Court of Georgia on appeal (J.A. 54-55). *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E.2d 92, 97 (1978).

6. The Federal District Court

Having properly exhausted this claim, Stephens presented it to the federal courts in his petition for a writ of habeas corpus filed in the United States District Court for the Middle District of Georgia (J.A. 64). The District Court denied relief, holding simply that "[t]he jury found beyond a reasonable doubt two statutory aggravating circumstances . . . supported by the evidence and either finding is grounds for the imposition of the death sentence" (J.A. 73). *Stephens v. Zant*, No. 79-30-MAC (M.D. Ga. May 11, 1979).

7. The Court of Appeals' Opinion

On appeal, the United States Court of Appeals for the Fifth Circuit set aside Stephens' death sentence (J.A. 74-94).[24]

[24]The Fifth Circuit rejected Stephens' claims that: (i) his conviction for the murder of Roy Asbell in Bleckley County, following a plea for the kidnapping with bodily injury of Roy Asbell in Twiggs County, constituted double jeopardy (J.A. 76-81) (T. Clark, J. dissented on this ground, J.A. 92-94); (ii) that the failure to transcribe the *voir dire* and closing arguments violated the Eighth and Fourteenth Amendments (J.A. 81-87); and (iii) that the trial court's sentencing instructions were constitutionally inadequate (J.A. 87-88).

The Fifth Circuit remanded the case to the District Court for "whatever action is appropriate with respect to [three] . . . issues" bearing upon Stephens' conviction that had not been presented to the District Court in the first instance but were called to the Court of Appeal's attention in an *amicus curiae* brief:

> "(1) whether the trial jude should have ordered a compentency hearing in light of [Stephens'] . . . conduct at trial; (2) whether [Stephens] . . . was denied effective assistance of counsel because of counsel's inability to communicate with him; and (3) whether [Stephens'] . . . uncounseled confession was knowing and voluntary, in view of allegations that it was given while appellant was under the influence of drugs."

(continued)

The Fifth Circuit held that it was "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional aggravating circumstance" (J.A. 90-91). Since Stephens' jury had "authority to return a life sentence even if it found statutory circumstances" (J.A. 92), there was an inevitable risk that, but for the trial court's submission and the jury's finding of the unconstitutional circumstance, the jury would not have recommended the death penalty. Drawing upon the logic developed by this Court in *Stromberg v. California*, 283 U.S. 359 (1931), and upon the Court's insistence in *Furman v. Georgia*, 408 U.S. 238 (1972), that " the death penalty . . . not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner" (J.A. 90), the Court of Appeals concluded that "the jury's discretion here was not sufficiently channeled . . . and that the process in which the death penalty was imposed in this case was not 'rationally reviewable'" (J.A. 91).

Petitioner Zant petitioned for rehearing and for rehearing *en banc*, largely on the basis of a passage in the panel's opinion stating that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of [Stephens] . . . which

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(footnote continued from preceding page)

(J.A. 91-92.) *Amicus curiae* also pointed out a fourth issue in Stephens' case that had not been addressed below—the failure to obtain a jury finding on the question whether Stephens himself ever took or intended to take the life of the victim, and whether a death sentence imposed without such a finding violates the Eighth and Fourteenth Amendments. We note that the Court has granted certiorari in *Enmund v. Florida*, No. 81-5321, ___ U.S. ___, 50 U.S. L.W. 3300 (Oct. 20, 1981) to resolve a similar claim.

otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions" (J.A. 91). Zant called the Fifth Circuit's attention to several prior Georgia cases holding that felony convictions are admissible during the penalty phase of capital trial. *E.g.*, *Hughes v. State*, 239 Ga. 393, 397-98, 236 S.E.2d 829, 833 (1977).

The Court of Appeals, in an amended opinion, deleted its reference to the *inadmissibility* of evidence of prior felony convictions but reiterated its observation that the unconstitutional instruction "may have unduly directed the jury's attention to his prior convictions" (J.A. 95). The petition for rehearing was otherwise denied. No judge in regular active service in the Fifth Circuit requested a poll on petitioner Zant's petition for rehearing *en banc*, and that petition was consequently denied.[25].

SUMMARY OF ARGUMENT

It is undisputed that Alpha Stephens' jury received an erroneous instruction authorizing it to base a verdict of death upon a statutory aggravating circumstance later held unconstitutional. Equally clearly, Stephens' jury considered the invalid aggravating circumstance, for it rendered a written verdict which explicitly identified that circumstance as one of the bases for its determination to impose a death sentence. The question presented here is thus whether a capital sentence founded in part upon an unconstitutional considera-

[25]The Attorneys General as *amici curiae* direct the Court's attention to a subsequent decision by the Fifth Circuit in *Williams v. Blackburn*, 649 F.2d 1019 (5th Cir. 1981) which they suggest "appears to directly conflict with its decision in the present case." (Atty. Gen Br., at 15 n.7). The Fifth Circuit has subsequently vacated its opinion in *Williams* and ordered the case to be reheard *en banc*. *Williams v. Blackburn*, ___ F.2d ___ (5th Cir. 1981).

tion may be affirmed on the ground that other, constitutionally permissible factors were also weighed by the jury in reaching its sentencing determination.

Central principles of this Court's Eighth Amendment jurisprudence answer the question: no death sentence imposed after such an error may be affirmed. An unbroken line of decisions since *Furman v. Georgia*, 408 U.S. 238 (1972), requires any State wishing to impose a capital sentence to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a death sentence,'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (footnote omitted). Special capital sentencing require ments derive from the Court's recognition that "there is a significant constitutional difference between the death penalty and lesser punishments," *Beck v. Alabama*, 447 U.S. 625, 637 (1980), and that this qualitative difference "calls for a greater of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

The submission to Stephens' jury of an invalid aggravating circumstance violated each of these procedural requirements. Instead of channeling the jury's sentencing discretion according to a "clear and objective" standard, it explicitly invited the exercise of that discretion to be based in part upon consideration of a standard which the Supreme Court of Georgia itself has judged to be unconstitutionally vague. The result was a death sentence resting, to an extent that no appellate court can ever reconstruct or adequately review, upon an unconstitutional foundation. To sustain such a sentence would "diminish the reliability of the [sentencing]... determination," *Beck v. Alabama, supra*, 447 U.S. at 638, in a manner which "creates the risk" of a misguided choice of sentence that is "unacceptable" when "the choice is between

life and death," *Lockett v. Ohio*, *supra*, 438 U.S. at 605.

Other settled lines of authority compel the same conclusion. In *Stromberg v. California*, 283 U.S. 359 (1931), and succeeding cases, the Court has developed the rule that no verdict dependent on a combination of constitutionally impermissible and constitutionally permissible grounds can stand, because of "an unacceptable danger that the trier of fact will have regarded the two . . . as 'intertwined' and have rested [its decision] . . . on both together," *Street v. New York*, 394 U.S. 576, 588 (1969). The *Stromberg* line is consistent with many prior decisions of the Court which have stressed the necessity of accurate jury instructions, especially on capital sentencing issues. The manifest fairness and logic of requiring such instructions has led a majority of the state courts which have faced the issue to reach the same conclusion adopted by the Court of Appeals below, vacating death sentences tainted by a jury's consideration of an impermissible aggravating factor.

Petitioner Zant opposes the Court of Appeals' judgment primarily as an overbroad reading of the *Stromberg* line. Yet petitioner identifies no sound distinction between that line and the present case. If there is any distinction at all, it is that the Eighth Amendment's requirement of heightened reliability in capital sentencing (which petitioner largely ignores) renders *Stromberg*'s reasoning still more compelling in the capital context.

Amici curiae base their arguments for reversal upon a tortured interpretation of capital sentencing procedures that is without foundation in this Court's prior cases and would make nonsense of the Court's efforts to minimize the risk of arbitrariness in capital sentencing. Under close inspection, *amici*'s arguments depend upon the unsupported speculation that Stephens' jury would have imposed a death sentence no matter what sentencing instructions it received. Neither the

Eighth Amendment nor the Due Process Clause permit a capital inmate to be sent to his death upon this sort of baseless surmise. Stephens is entitled to a new sentencing hearing untainted by the error present in this record.

I.

THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE PLAINLY REQUIRES THE REVERSAL OF A DEATH SENTENCE IMPOSED IN PARTIAL RELIANCE UPON AN UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE

The Court of Appeals' reversal of Alpha Stephens' death sentence marks no new direction in capital punishment law. Instead, it is plainly consistent with—indeed, compelled by—the Eighth Amendment standards of procedural fairness carefully developed by this Court during the past decade. In *Furman v. Georgia*, 408 U.S. 238 (1972), after "focusing on the procedures by which convicted defendants were selected for the dealth penalty," the Court "conclu[ded] that the statutes before [it] . . . were constitutionally invalid," *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (opinion of Justices Stewart, Powell & Stevens). The procedural shortcoming identified in those statutes was that their lack of guidance to the sentencing jury "created a substantial risk that [the death penalty] . . . would be inflicted in an arbitrary and capricious manner," *id.* at 188.

Four years later, in *Gregg v. Georgia* and companion cases,[26] the Court examined three restructured capital statutes

[26] *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

which "attempted to address the concerns expressed by the Court in *Furman* . . . by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence," *Gregg v. Georgia, supra*, 428 U.S. at 180. The very procedural features upon which the Court relied in *Gregg* to uphold the Georgia statute are those most seriously compromised by the unconstitutional instruction given to Alpha Stephens' jury. A brief reexamination of these features demonstrates exactly why the Court of Appeals was led to invalidate Stephens' death sentence.[27]

The most prominent characteristic of Georgia's post-*Furman* capital statute was described by the Court as being the abandonment of unfettered jury sentencing discretion in favor of objective, legislatively defined aggravating circumstances designed to guide and focus jury deliberations. *Gregg v. Georgia, supra*, 428 U.S. at 196-198, 206-207. As one principal opinion noted:

> "The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary

[27]Petitioner intimates that the Court in *Gregg* dealt with "similar circumstances" to those in the present case, since there "the death penalty imposed for murder was upheld even though the death penalty for armed robbery had been set aside . . . [and] [o]ne of the aggravating circumstances . . . was that [the murder] occurred during the commission of another capital felony, armed robbery." (Pet. Br., at 8.) But of course the Georgia Supreme Court's decision that the death penalty would not be carried out for robbery (see *Gregg v. Georgia, supra*, 428 U.S. at 162), had nothing whatever to do with the propriety of submitting robbery to the jury as an aggravating circumstance in a murder prosecution. Both in Gregg's own case and elsewhere, the Georgia Supreme Court has consistently held that armed robbery, rape and kidnapping would continue to be deemed "capital felonies" for the purpose of submission to juries as statutory aggravating circumstances. *Gregg v. State*, 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974); *see, e.g., Peek v. State*, 239 Ga. 422, 432, 238 S.E.2d 12, 20 (1977). The Court in *Gregg* thus did not face, even tangentially, the issue presented here.

> and relevant to the question whether a defendant convicted of capital murder should be sentenced to death. The jury which imposes sentence is instructed on all statutory aggravating factors which are supported by the evidence, and is told that it may not impose the death penalty unless it unanimously finds at least one of those factors to have been established beyond a reasonable doubt. The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion . . ."

Id. at 221-22 (concurring opinion of Justice White).[28] The Court recognized that, because of the wide range of evidence presented to a sentencing jury under a bifurcated statute, the legislative designation of aggravating circumstances was crucial in avoiding the arbitrariness condemned by *Furman*:

> "[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg v. Georgia*, *supra*, 428 U.S. at 192.

The dilemma posed by the need to provide lay juries with a wide range of sentencing evidence while simultaneously

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[28] *Accord*: *Proffitt v. Florida*, *supra*, 428 U.S. at 253 ("Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty"); *Jurek v. Texas*, *supra*, 428 U.S. at 270 ("While Texas has not adopted a list of statutory aggravating circumstances . . . its [legislative] action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.") *See Bullington v. Missouri*, ___ U.S. ___, 68 L.Ed.2d 270, 275 (1981) ("the Missouri statutes contain substantive standards to guide the discretion of the sentencer.")

guiding their consideration of it so as to control against arbitrary capital sentencing was resolved by recourse to carefully constructed, objective, "legislative guidelines," *id.* at 207, which direct and focus the jury's attention as they engage in weighing the significance of the relevant sentencing information which they have received. *Id.* at 197-198.[29]

Inseparable from reliance upon objective legislative standards to avoid arbitrariness is the requirement that the trial court instruct the sentencing jury about those standards, so as to give it accurate "guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision," *Gregg v. Georgia*, *supra*, 428 U.S. at 192.

> "The idea that a jury should be given guidance in its decision making is . . . hardly a novel proposition. Juries are invariably given careful instructions in the law and how to apply it . . . When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

Id. at 192-93.

The inclusion of an unconstitutional aggravating circumstance in the sentencing instructions given Stephens' jury critically impaired these procedural protections. His jury was not only licensed to go outside the regular roster of valid sentencing considerations that govern juries at all other Georgia penalty trials; it was affirmatively misdirected to

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[29]The well-established role played by statutory aggravating circumstances in guiding jury discretion is ignored by those Attorneys General who suggest as *amici curiae* that such circumstances form no more than a "threshold" consideration and become "irrelevant" once "one statutorily-defined class is found to be present" (Atty. Gen Br. at 7). See discussion *infra*, at pp. 55-56.

consider in aggravation an unconstitutional circumstance, so held by the Georgia Supreme Court precisely "because it did not set 'sufficiently "clear and objective standards," ' " *Gregg v. Georgia, supra*, 428 U.S. at 166 n.9.

The Georgia statutory procedure approved in *Gregg* requires the jury to evaluate the statutory aggravating circumstances which it finds in the light of any mitigating factors present before deciding upon a sentence. The judge is to "include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any . . . statutory aggravating circumstances . . . supported by the evidence." Ga. Code Ann §26-3102. The jury may impose a death sentence on the basis of a single statutory aggravating circumstance, but "even if aggravating circumstances [are] . . . present, the death penalty *need not* be imposed if the jury [finds] . . . they [are] . . . outweighed by mitigating circumstances," *Coker v. Georgia*, 433 U.S. 584, 589-90 (1977) (plurality opinion) (emphasis added).[30] Moreover, Georgia juries may make a recommendation of mercy that is binding on the trial court, see *Gregg v. Georgia, supra*, 428 U.S. at 197, despite the absence of any mitigating circumstances. Thus, the heart of the jury's deliberative process is its consideration of the weight to be accorded to the totality of the circumstances designated as aggravating, in relation to the mitigating factors present.

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[30] *Accord*: *Proffitt v. Florida, supra*, 428 U.S. at 248, 250 ("At the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist' "; "The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant.") *See Bullington v. Missouri, supra*, 68 L.Ed.2d at 276 ("The jury must consider whether . . . any mitigating circumstances that exist outweigh the aggravating circumstances.")

Since the very purpose of statutory aggravating circumstances is to direct the jury's attention to those factors that "the State, representing organized society, deems particularly relevant to the sentencing decision," *Gregg v. Georgia, supra*, 428 U.S. at 192, it is reasonable to suppose—(and it is, of course, the constitutional premise of the *Gregg* decision)—that such instructions *do* direct and focus the attention of at least some jurors during their deliberations, and therefore that the erroneous instruction given here "may have . . . unduly directed the jury's attention to [Stephens'] . . . prior convictions" (J.A. 95), as the Court of Appeals found. To be sure, no one can retrospectively determine the precise impact on the jury's functioning of such an instruction, but the cognate reasoning in *Gardner v. Florida*, 430 U.S. 349, 359 (1977), seems particularly pertinent:

> "If . . . it is important to use [statutory aggravating circumstances] . . . in the sentencing process, we must assume that in some cases it will be decisive in the [jury's] . . . choice between a life sentence and a death sentence."

The inescapable risk that the instruction to Stephens' jury to consider an unconstitutional aggravating circumstance was a "decisive" factor in its verdict of death requires the invalidation of that verdict.

A final protective feature of the Georgia statute is its requirement that "the sentencing authority . . . specify the factors it relied upon in reaching its decision," *Gregg v. Georgia, supra*, 428 U.S. at 195, in order to provide "the further safeguard of meaningful appellate review," *id.* The Court explained in *Proffitt* that "[i]f a death sentence is imposed," and "the sentencing authority articulates in writing the statutory reasons that led to its decision," those reasons are available to a state's supreme court "which, because of its

statewide jurisdiction, can assure consistency, fairness and rationality in the even-handed operation of the state law," *Proffitt v. Florida*, *supra*, 428 U.S. at 259-60.

The Court has subsequently stressed the importance of ensuring "that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," *Gardner v. Florida*, *supra*, 433 U.S. at 361, cautioning that "[w]ithout full disclosure of the basis for the death sentence," a "capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*."[31]

[31]Justice White has intimated that a capital-sentencing system might survive constitutional attack, even if the sentencing deliberations of the jury could not be reconstructed, so long as the state supreme court could assert independently, on the basis of the record evidence, that a death sentence was warranted. *Drake v. Zant*, 449 U.S. 999, 1003 (1980) (opinion of Justice White, dissenting from denial of certiorari) ("The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.") But under the statutory scheme which Georgia has enacted and employs to make the life-or-death decision in all capital prosecutions, it is the jury, not the appellate court which determines whether to impose a death sentence: the *jury* is charged with considering both aggravating and mitigating circumstances to decide if the death penalty is warranted, Ga. Code Ann. § §26-3102, 27-2534.1; *see Gregg v. Georgia*, *supra*, 428 U.S. at 163-66, 197, 207-11, 221-22. This Court accordingly held in *Presnell v. Georgia*, 439 U.S. 14, 16 (1978), that for the Georgia Supreme Court to substitute its judgment for that of the jury would violate "fundamental principles of procedural fairness . . . ." The Court reaffirmed this position in *Godfrey v. Georgia*, *supra*, 446 U.S. at 429, noting that the role of the Supreme Court of Georgia was limited to "independently assess[ing] the evidence of record and determin[ing] that such evidence supports the trial judge's or jury's finding." The Georgia Supreme Court cannot, and *has not purported to*, substitute itself for the jury as an initial sentencer; its affirmance of Stephens' sentence does not rest on any such ground.

(continued)

In Stephens' case, his jury *did* specify those factors on which it relied; those factors included an unconstitutional aggravating circumstance. Thus, an appellate court, reviewing Stephens' sentence, can know to a certainty that his sentence was "imposed under the influence of... an arbitrary factor," *Gregg v. Georgia, supra*, 428 U.S. at 166-67, citing Ga. Code Ann. §27-2537(c)(3). Whether that arbitrary factor was decisive to Stephens' jury cannot be reconstructed. Under these circumstances, vacation of the death sentence is required. As the Fifth Circuit observed in a related context:

> "Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper . . . aggravating factors exerted a decisive influence on the sentencing determination. The guarantee against cruel and unusual punishment demands more."

Henry v. Wainwright, 661 F.2d 56, 59-60 (5th Cir. 1981).

To summarize this reexamination, each of the fundamental procedural safeguards approved in *Gregg*—objective legislative standards; careful jury instructions which provide guidance for the jury's task of weighing the totality of aggravating and mitigating factors; jury articulation of its sentencing rationale as a basis for meaningful appellate sentence review—would go for naught if a sentence could be affirmed despite uncertainty as to the possible influence of an

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(footnote continued from preceding page)

Justice Stevens intimated in *Drake* that it might be permissible for the Georgia Supreme Court, on review, to determine whether undisputed record facts fell within the "core conduct" of a constitutionally valid aggravating circumstance—Ga. Code Ann. §27-2534.1(b)(7). *Drake v. Zant, supra*, 449 U.S. at 1000 (Stevens, J., concurring). Such a holding would not, of course, apply in this case, where an unconstitutional circumstance is at issue.

unconstitutional sentencing instruction. Under circumstances in which "the jury's discretion . . . was not sufficiently channeled . . . [and] the process in which the death penalty was imposed . . . was not 'rationally reviewable'" (J.A. 91), the Court of Appeals was correct in determining that Stephens' "death sentence . . . cannot stand" (*id.*).

II.

WELL-ESTABLISHED PRECEPTS OF DUE PROCESS ALSO COMPEL THE VACATION OF RESPONDENT'S DEATH SENTENCE

Although Eighth Amendment principles suffice to require the invalidation of Alpha Stephens' death sentence, those principles are firmly bolstered by settled Fourteenth Amendment doctrines. The Court of Appeals appropriately drew upon one source of due process authority, *Stromberg v. California*, 283 U.S. 359 (1931), and successive cases (see J.A. 90); we shall shortly examine *Stromberg*'s controlling significance for the present case. Yet behind the *Stromberg* line stand numerous other decisions by the Court dealing with the effects of erroneous jury instructions—especially errors in capital sentencing instructions—which exemplify the Court's continuing concern to assure that jury verdicts will not rest upon infirm foundations which call their integrity into question. These cases demonstrate a longstanding, principled insistence that the process of jury decisionmaking be properly guided by constitutionally adequate instructions from trial courts. That well-developed, fundamental point controls this case.

A. Stephen's Death Sentence Was Properly Vacated Under *Stromberg v. California*

The Court of Appeals noted that in *Stromberg v. California, supra*, this Court held that "if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside" (J.A. 90). Concluding that "[t]his settled principle of law applies with particular force in cases in which the death penalty has been imposed" (*id.*), the court found that Stephens' case fell squarely within the rule because "[i]t is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance" (J.A. 90-91).

Stromberg involved a jury charge encompassing at least three theories of criminal liability, each theory embodied in a separate statutory clause aimed at a different possible motive or intention for displaying a red flag.[32] The California appellate court, though "doubting the constitutionality of the first clause" of the statute, upheld Stromberg's conviction by "rest[ing] its decision upon the remaining clauses," *Stromberg v. California, supra*, 283 U.S. at 367. This Court reversed,

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[32]Stromberg had apparently displayed a red flag at a California summer camp. Under §403a of the California Penal Code, it was a felony in California to display a red flag in a public place either (i) "as a sign . . . of opposition to organized government," or (ii) as an invitation or stimulus to anarchistic action, or (iii) "as an aid to propaganda that is of a seditious character," *Stromberg v. California, supra*, 283 U.S. at 361. Another count of the information, charging Stromberg with conspiracy, was not considered by the Court. *Id.*

agreeing that the first clause was unconstitutional and finding that "it is impossible to say under which clause of the statute the conviction was obtained," *id.* at 368, so that the conviction "may have rested upon [the invalid] clause exclusively," *id.* at 370.

Stromberg has since been followed consistently. *See e.g., Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Yates v. United States*, 354 U.S. 298, 311-12 (1957); *Gregory v. Chicago*, 394 U.S. 111, 113 (1969); *Street v. New York*, 394 U.S. 576, 585-88 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 570-71 (1970).[33] In *Thomas v. Collins* and more recently in *Street v. New York*, the Court made it clear that *Stromberg* is not limited to situations in which the jury's verdict may have rested exclusively on an unconstitutional basis but also reaches situations in which a verdict may have rested on *both* a valid and an invalid ground. Justice Harlan, speaking for the Court, held that

> "even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on [an unconstitutional ground] . . . , we are still bound to reverse if the conviction could have been based upon *both* [an unconstitutional ground] . . . and [a constitutional ground]."

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[33]Those Attorneys General appearing as *amici curiae* suggest that this line of cases "relate[s only] to the statutory abridgment of First Amendment rights" (Atty. Gen. Br. at 15). They are incorrect. *Williams v. North Carolina, supra*, for example, involved a bigamy conviction, and *Cramer v. United States, supra*, a conviction for treason. Neither case turned on First Amendment principles, and the Court has never intimated that *Stromberg* is limited to First Amendment cases.

Street v. New York, *supra*, 394 U.S. at 587 (emphasis in original). For when a jury receives instructions concerning "both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of the fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together," *id.* at 588.

The sentencing verdict returned by Stephens' jury indicates that the jury found two permissible aggravating circumstances. Yet neither of these circumstances, singly or in combination, *required* the jury to impose a death sentence; they merely authorized it.[34] After deliberating on the cumulative weight of these two permissible aggravating circumstances and one unconstitutional aggravating circumstance cited in its verdict, and also on the weight of the mitigating evidence presented, Stephens' jury recommended a death sentence. This recommendation, the ultimate sentencing decision under Georgia law, must thus properly be viewed as a general verdict in which the basis for the jury's over-all determination to take Stephens' life is not revealed. Having reached its three special verdicts of aggravating circumstances, the jury was not obliged to recommend death on the basis of any one or all of them; it was obliged to—and presumably did—consider them all in making its final choice of a life or death recommendation. As in this Court's prior general-verdict cases, there is no way to know that the jury did not rely decisively upon the unconstitutional ground in making that final choice.

But the *risk* that is may have done so—the "unacceptable danger" described in *Street v. New York*, *supra*, 394 U.S. at

[34]By contrast, if the jury in *Stromberg* had shown by its verdict that it had found her to have displayed a red flag as an invitation or stimulus to anarchic action or in aid of seditious propaganda, a guilty verdict was *required* by the applicable California statute and jury instructions.

588—is revealed as a certainty by the jury's verdict here. The jury expressly found the unconstitutional circumstance in its verdict, and to that extent at least considered it. This makes the case a stronger one for distrust of the jury's ultimate general verdict than either *Stromberg* or *Street*; thus, the Court of Appeals correctly held that the verdict could not stand consistently with those cases and the others in the *Stromberg* line.[35]

B. Other Non-Death Cases And Cases Decided By This Court In Its Supervisory Role Demonstrate The Correctness Of The Court Of Appeals' Decision

The Court's Eighth Amendment and Due Process Clause opinions have not sprung from a legal vacuum. Over the course of the past half-century, the Court has wrestled with jury instruction issues in a wide variety of settings; many of the standards and procedures now constitutionally required were first formulated by the Court in its supervisory role within the federal system. Others were advanced as constitutional principles in non-death cases. The vacation of Stephens' death sentence has a well-established foundation in these earlier cases.

For example, in *Bollenbach v. United States*, 326 U.S. 607 (1946), the Court reviewed a conspiracy conviction for

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[35]For obvious reasons, neither the petitioner nor *amici curiae* have suggsted that the fact that Stephens' case arises in a sentencing context, rather than a guilt context, makes a constitutional difference. This Court has unequivocally held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," *Gardner v. Florida* 430 U.S. 349, 358 (1977); *see e.g., Green v. Georgia*, 442 U.S. 95, 97 (1979); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *see also Bullington v. Missouri*, ___ U.S. ___, 68 L.Ed.2d 270, 282-84 (1981).

interstate transportation of stolen securities. The matter at issue was the propriety of an admittedly dubious jury instruction suggesting that the possession of stolen securities in another State raised a presumption that the securities had been transported by the possessor. The Government urged the Court to "sustain the conviction on the assumption" that, despite the erroneous instruction, overall "the jury was properly guided," *Bollenbach v. United States*, *supra*, 325 U.S. at 613. Justice Frankfurter for the Court flatly rejected this argument:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks . . . It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide."

Id. at 613-14.[36]

The Court in *Bollenbach* also rejected the Government's argument that, regardless of the erroneous instruction, the

[36]In *Bihn v. United States*, 328 U.S. 633, 638 (1946), the Court, citing its earlier opinion in *McCandless v. United States*, 298 U.S. 342, 347 (1936), suggested that "'an erroneous [charge] . . . which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial' " (emphasis in original).

evidence in the record clearly proved the defendant was guilty. "[T]he question," the Court insisted, "is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials," *id.* at 614.[37] Similar arguments have been advanced in the present case to sustain Stephens' death sentence; this Court's answer in *Bollenbach* is equally appropriate here.

More recently, the Court has followed a similar approach in two state criminal cases involving jury instructions challenged on constitutional grounds.

The trial court in *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979), had instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was not unconstitutional if viewed as creating a permissive inference; but, viewed as creating a mandatory or burden-shifting presumption, it was unconstitutional. The court reversed Sandstrom's conviction, reasoning that if a "reasonable juror" could have given the instruction an unconstitutional interpretation, the Court could not "discount the possibility that Sandstrom's jurors actually did proceed upon" such an interpretation. *Id.* at 519.

Here too, the Court "cannot discount the possibility that [Stephens']... jurors actually did proceed" to impose a death sentence not solely on account of the two permissible statutory aggravating circumstances found, but only upon consideration of the cumulative impact of all three aggravating circumstances, including the unconstitutional one. "[A]

[37]The Court restated this principle in *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 410 (1947): "No matter how clear the evidence, [a defendant is]... entitled to have the jury instructed in accordance with the standards which [the legislature] . . . has prescribed. To repeat, guilt is determined by the jury, not the court."

reasonable juror," in short, "could well have been misled," *id.* at 517, to rely at least in part upon the unconstitutional aggravating circumstance submitted for the jury's consideration by the instructions which Stephens' trial court gave.

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Court dealt with a jury instruction issue bearing a still closer resemblance to Stephens'. The *Hicks* jury had been instructed that, under an habitual offender statute, the jurors were to assess the defendant's punishment at 40 years imprisonment if they found him guilty. The defendant was convicted and given a 40-year sentence. Thereafter the Oklahoma Court of Criminal Appeals declared the habitual offender statute unconstitutional. The prosecution nevertheless sought to sustain Hicks' sentence, contending that "the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event," *Hicks v. Oklahoma, supra*, 447 U.S. at 345. This Court disagreed. It held that Oklahoma could not deny the defendant the right to a sentence imposed by a properly instructed jury "simply on the frail conjecture that [such] a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Id.* at 346 (emphasis in original).

Alpha Stephens likewise was tried by a jury which was told that it could take into consideration in assessing punishment a statutory aggravating circumstance later held unconstitutional. The State of Georgia contends here, as did the State of Oklahoma in *Hicks*, that because other statutory aggravating circumstances were found, Stephens might well have received the same punishment even had his jury been properly instructed. *Hicks*' answer is equally applicable: "the frail

conjecture that [Stephens'] . . . jury *might* have imposed a sentence equally harsh" cannot sustain his death sentence consistently with the demands of due process.

This result is particularly appropriate in view of the Court's longstanding concern that all requirements of procedural fairness be scrupulously observed where life is at stake. Nowhere has this concern been more sharply focused than in cases involving questionable capital sentencing instructions. In *Calton v. Utah*, 130 U.S. 83 (1889), for example, the Court vacated a death sentence because the defendant's jury "were not informed as to their right, under the statute, to recommend imprisonment for life . . . in place of the punishment of death," *id.* at 86. Citing "the fundamental rules obtaining in the trial of criminal cases involving life," *id.* at 87, the Court rejected arguments by the Government that it could be "presumed that [the jurors] . . . were aware of their right" to give a life sentence, and that reversal was unwarranted since the jurors might have decided to impose a death sentence even had they been properly instructed. *Id.* at 86.

Subsequently, in *Winston v. United States*, 172 U.S. 303 (1899), the Court reversed death sentences which had been imposed in the absence of jury instructions adequately informing the jurors of their discretion to choose a life sentence. The Court noted that it had consistently "upheld and guarded" the sentencing rights of capital defendants "as against the possible effect of any restriction or omission in the . . . instructions of the judge presiding at the trial." *Id.* at 312. The same concern was demonstrated again in *Andres v. United States*, 333 U.S. 740 (1948), where the jury had received an ambiguous instruction concerning the requirement of unanimity in recommending a sentence. After examining this instruction, the Court concluded that its language might have misled reasonable jurors regarding their

statutory power to make a non-unanimous recommendation of mercy. Andres' death sentence was accordingly reversed. "In death cases," the Court said, "doubts such as those presented here should be resolved in favor of the accused." *Id.* at 752.[38]

The principal teaching of all of these cases is that jury instruction on crucial issues, especially instruction relating to the procedures that a jury must observe in the process of capital sentencing, is so fundamental an element of due process that the risks created by instructional error cannot be countenanced.[39] With his life at stake, Alpha Stephens is entitled to greater assurance than any *post hoc* speculation can provide, that his sentencing jury did not accept the explicit invitation tendered to it by his trial judge, to base a death sentence at least in part upon an unconstitutional aggravating circumstance.

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[38]This special emphasis on procedural fairness in death cases has also been a recurring theme in decisions not involving jury instructions. *See e.g., Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Stein v. New York*, 346 U.S. 156, 196 (1953); *Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J. concurring); *id.* at 77 (Harlan, J., concurring).

[39]Neither *Cupp v. Naughton*, 414 U.S. 141 (1973), nor *Henderson v. Kibbe*, 431 U.S. 145 (1977) is to the contrary. *Cupp* concerned a charge which was found by this Court not to be unconstitutional, but to involve at most a "tangential undercutting . . . as a theoretical matter," of the presumption of innocence elsewhere "clearly stated" in the jury instructions. *Cupp v. Naughton, supra*, 414 U.S. at 149. By contrast, the aggravating-circumstance instruction given to Stephens' jury was acknowledged to be unconstitutional by the Georgia Supreme Court. *Henderson v. Kibbe* involves, not affirmative "misstatement of the law," *Henderson v. Kibbe, supra*, 431 U.S. at 155, such as occurred in Stephens' case, but rather an "omission" which the Court determined was not critical in light of other, largely overlapping instructions given to the jury.

C. A Majority Of State Courts Which Have Considered This Issue Concur With The Judgment Of The Court Of Appeals

It is ironic that *amici* should choose to castigate the Court of Appeals' decision below as "a classic instance of an unjustified and hypertechnical reversal of a death sentence" by a federal appellate court, Atty. Gen. Br., at 22. In fact, a majority of state appellate courts which have addressed the issue have agreed with the Fifth Circuit that a capital jury's partial reliance on an impermissible aggravating circumstance requires the reversal of the defendant's death sentence. Alabama: *Cook v. State,* 369 So.2d 1251, 1255-57 (1979); *Bufford v. State*, 382 So.2d 1162, 1174-75 (Ala. Cr. App. 1980); Arkansas: *Williams v. State*, 621 S.W.2d 686, 687-88 (1981); Delaware: *Whalen v. State*, 395 A.2d 108 (1980);[40] Idaho: *State v. Osborn*, 631 P.2d 187, 198-99 (1981);[41] Illinois: *People v. Brownell*, 404 N.E.2d 181, 195

[40]The Supreme Court of Delaware noted in *Whalen* that it had held in a earlier case that a statutory aggravating circumstance that the victims were 'elderly' and 'defenseless' (also submitted to *Whalen*'s jury) was unconstitutionally vague. The Court held that while Whalen "was found guilty of rape, itself a statutory aggravating circumstance, we are not prepared to assume the defendant was not prejudiced by this error." The Court also faulted the jury's failure to designate in its sentencing verdict any of the aggravating circumstances which it found.

[41]The Supreme Court of Idaho held in *Osborn* that "the inclusion of [an impermissible aggravating circumstance] . . . would be ill-advised due to its possible impact on the process of balancing the aggravating circumstances found . . . and the mitigating circumstances," *State v. Osborn, supra*, 631 P.2d at 198. However, because Osborn had been sentenced by a trial judge who entered written findings of fact and conclusions of law and specifically stated that the factor at issue had "not [been] relied upon as a statutory aggravating circumstance," *id.*, the Court declined to find error. (Osborn's death sentence was reversed on other grounds.)

(1980); North Carolina: *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551, 568 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569, 587-88 (1979); *State v. Irwin*, ____ N.C. ____, 282 S.E.2d 439, 448-49 (1981); *cf. State v. Taylor*, ____ N.C. ____, ____, ____ S.E.2d ____, ____ (1981);[42] Tennessee: *State v. Moore*, 614 S.W.2d 348, 351-52 (1981); Wyoming: *Hopkinson v. State*, 632 P.2d 79, 171-72 (1981). *See also* California: *People v. Green*, 164 Cal. Rptr. 1, 609 P.2d 468, 509-14 (1980);[43] South Carolina: *State v. Gilbert*,

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[42]The Supreme Court of North Carolina has adopted the rule that reversal of a death sentence imposed in partial reliance on an impermissible aggravating circumstance is required if "there is a *reasonable possibility* that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify imposition of the death penalty." *State v. Irwin, supra*, ____ N.C. at ____; 282 S.E.2d at 449. Under that standard, the North Carolina Supreme Court has reversed every death sentence in which an erroneous aggravating circumstance has ben relied upon except the one in *State v. Taylor, supra*, where the erroneous aggravating circumstance was the accompanying felony used at the guilt phase to convict the defendant on a felony-murder theory. (The felony aggravating circumstance was deemed improperly submitted under the North Carolina Supreme Court's rule that a felony used to support a felony-murder may not be resubmitted as an aggravating circumstance at the sentencing phase.)

[43]In *People v. Green*, the California Supreme Court rejected one of the "special circumstances" which constitute a prerequisite for imposition of a death sentence on the ground that it could not determine whether the jury relied upon two legally insufficient bases for such a finding or on a third, legally adequate basis. *Id.* at 509. The Court applied California's "settled and clear" rule on appeal that "when the prosecution presents its case to the jury on alternative theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." *Id.* at 510. Since the only other special circumstance present was also found to have been invalid on a separate ground, see *id.* at 506, the Court did not have to apply its settled rule to the precise issue presented in *Stephens*.

___ S.C. ___, 283 S.E.2d 179 (1981).[44] Only three (or perhaps as many as five) states besides Georgia have reached a contrary result: Arizona: *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, 895-97 (1980); Louisiana: *State v. Monroe*, 397 So.2d 1258, 1274-76 (1981); Nebraska: *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, 872-76 (1977). *See also* Florida: *Brown v. State*, 381 So.2d 690, 696 (1980);[45]

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[44]In *Gilbert*, the Supreme Court of South Carolina considered at length whether one of two aggravating circumstances relied upon by the defendant's jury should have been submitted. Although the majority concluded that the circumstance was properly submitted, its entire discussion appears to assume that, had the submission been improper, the defendant's death sentence would have had to be vacated. Justice Harwell dissented, contending that the second aggravating circumstance should not have been submitted to the jury. He went on to state: "Any contention that the error is harmless since one other aggravating circumstance was found to exist beyond reasonable doubt is without merit. The jury can recommend life even if an aggravating circumstance is properly established. Thus, we can only speculate as to whether this jury would have recommended death had only the armed robbery circumstance been submitted to it for consideration. This speculation is the sort of arbitrary factor which is intolerable in a case of this nature," *State v. Gilbert, supra*, ___ S.C. ___, 283 S.E.2d at 184 n.3.

[45]In *Elledge v. State*, 346 So.2d 998 (1977), the Florida Supreme Court held that in cases where at least some mitigating circumstances were found, it could not know the effect of the submission of an impermissible aggravating circumstance and "since a man's life [was] at stake" found itself "compelled to return the case to the trial court for a new sentencing trial." *Id.* at 1003. In *Brown*, the Supreme Court of Florida distinguished *Elledge*, saying that, because of the clarity of the sentencing judge's findings on aggravating and mitigating circumstances " 'we can know' that the result of the weighing process would not have been different had the impermissible factors not been present." *Brown v. State, supra*, 381 So.2d at 696.

Missouri: *State v. Mercer*, 618 S.W.2d 1 (1981).[46]

State court reluctance to affirm a tainted capital sentencing verdict is exemplified in *Williams v. State*, where the Arkansas Supreme Court considered a death sentence imposed on a penitentiary parolee who had burglarized the home of his former girlfriend, stabbing her in the arm and back and fatally stabbing her paramour 18 times. The State submitted two valid aggravating circumstances to the jury; it also submitted as a third circumstance that "the person previously committed another felony an element of which was the use or threat of violence to another person," *Williams v. State, supra*, 621 S.W.2d at 68. This third circumstance was factually based upon evidence of a prior burglary conviction. Because burglary under Arkansas law does not necessarily involve a threat of personal violence, the Arkansas Supreme Court held that the third aggravating circumstance should not have been submitted to the jury. Despite the existence of two valid aggravating circumstances and despite an absence of mitigating evidence, the court refused to uphold the death sentence:

> "We cannot, as the State urges us to do, hold the error to be harmless on the theory that the jury found two other aggravating circumstances and no mitigating ones. The jury must find not only that the aggravation outweighs the mitigation but also that the aggravating circum-

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[46]The Supreme Court of Missouri did not directly resolve this issue in *Mercer* since it held that "the evidence supports the jury's findings on both aggravating circumstances" presented, *id.* at 10 n.5. The Court did observe in a footnote that its statute was similar to that of the state of Georgia, citing the Georgia cases on this issue, but the Missouri court also cited the contrary authority, including the opinion of the Court of Appeals in *Stephens*, without expressly stating which line of cases it would follow when the issue was squarely presented.

> stances 'justify a sentence of death beyond a reasonable doubt' §41-1352(1)(c). In a death case we are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three."

Id.[47]

The Supreme Court of Tennessee also declined to speculate on the effects of an improper aggravating circumstance in *State v. Moore*, a case closely parallel to Stephens'. The evidence in *Moore* established as a valid aggravating circumstance that the defendant had first kidnapped his 18-year-old victim, then shot him repeatedly and mutilated his body. The State also submitted as a second aggravating circumstance that the defendant had a "prior conviction involving the use or threat of violence," and offered evidence of his prior convictions for arson and second degree burglary. The Tennessee Supreme Court, observing that under Tennessee law these crimes did not necessarily involve the use or threat of violence, held that the submission to the jury of this aggravating circumstance was erroneous. Although the court acknowledged that evidence of these convictions was admissible during the sentencing phase, it observed that "these crimes were not properly shown to quality as [statutory] aggravating circumstances . . . Yet they were offered *for that very purpose* and the jury was told that one of them did

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[47]The Attorneys General who have appeared as *amici curiae* describe *Williams* as a case "wherein the invalid aggravating circumstance caused the admission of otherwise inadmissible evidence," Atty. Gen. Br. at 14 n.6. Nothing in the *Williams* opinion supports their proposition that the burglary conviction was inadmissible during the sentencing phase. The Arkansas Supreme Court held only that "this particular *aggravating circumstance* . . . should not have been submitted without proper supporting proof," *Williams v. State*, *supra*, 621 S.W.2d at 687 (emphasis added), not that the burglary conviction was inadmissible.

qualify," *State v. Moore*, 614 S.W.2d at 352 (emphasis added). Since the Court had "no way of knowing whether the jury would have imposed the death penalty had they not been permitted to so consider this evidence (*i.e.*, as constituting "statutory aggravating circumstances") in their weighing process," *id.*, the court vacated the defendant's death sentence.

The Supreme Court of Illinois in *People v. Brownell* expressed a separate but related idea—the impropriety of a reviewing court's usurpation of the sentencing authority's role—when it vacated the death sentence imposed by a trial judge on a defendant who had kidnapped, raped and strangled a young hitchhiker. Acknowledging that the trial judge had properly relied on the aggravated kidnapping and rape as aggravating circumstances, the Illinois Supreme Court went on to hold that another aggravating circumstance (that the victim was an eyewitness) had not been established within the meaning of the statute, and concluded:

"[W]e deem it necessary to a complete and fair sentencing hearing that we vacate the sentence of death . . . The partial sentencing hearing is essential because of the profound importance we attach to the trial court's role in weighing aggravating and mitigating factors. In this instance, the trial court weighed an aggravating factor which we have concluded figured erroneously in the court's sentencing decision. We have now removed that factor from the scale. Whether the scale will remain stable or will tip as a result of our conclusion is initially for the trial court to determine."

Id. at 195.

III.

PETITIONER AND *AMICI CURIAE* PRESENT NO VALID ARGUMENT FOR REVERSING THE JUDGMENT OF THE COURT OF APPEALS

Petitioner Zant advances two reasons why the judgment of the Court of Appeals should be reversed: first, that the Fifth Circuit misapplied *Stromberg v. California* (Pet. Br., at 10); second, that the Fifth Circuit misunderstood the law of Georgia concerning the admission of nonstatutory aggravating circumstances during the sentencing phase (*id.*). We will deal with each of these arguments in turn.

Petitioner argues that *Stromberg* is inapplicable here because it involved "a general verdict," Pet. Br. at 10, while the Stephens verdict was "not a general verdict" inasmuch as "[t]hree statutory aggravating circumstances were specified in writing by the jury," *id.* This argument is incorrect even as an exercise in nomenclature: the jury's recommendation that Stephens be punished with death was the prototype of a "general verdict" since it was neither legally required nor adequately explained by the three special verdicts of aggravating circumstances which the jury also found.[48] In any

[48] A general verdict is one "whereby the jury finds either for the plaintiff or for the defendant in general terms " BLACK'S LAW DICTIONARY 1731 (4th ed. rev. 1968), as "distinguished from a special verdict . . . by which the jury finds facts only . . . leaving to the court the application of the law to the facts thus found," *id.* Although Stephens' jury was required to indicate its findings on certain facts, viz. the statutory aggravating circumstances, a death sentence did *not* follow as a matter of Georgia law from the findings of those facts. As petitioner concedes, "a statutory aggravating circumstance is a prerequisite to consideration of imposition of a sentence of death; it is not tantamount to imposing the death penalty," Pet. Br. at 8. Stephens' jury "impos[ed] the death penalty" by its recommendation of death; this ultimate recommendation was a general verdict in both form and substance.

event, nomenclature is no substitute for analysis; analysis obviously reveals that the evil identified in *Stromberg*—the inability of a reviewing court to satisfy itself that the jury did not rely on an unconstitutional ground—is stronger here than in *Stromberg* precisely *because* Stephens' jury did specify the unconstitutional aggravating circumstance, along with two constitutional aggravating circumstances, in its verdict. As we have seen, *Street v. New York, supra* holds that "we are . . . bound to reverse if the conviction could have been based upon *both* [the unconstitutional ground] . . . and [the constitutional ground]," 394 U.S. at 587 (emphasis in original), in view of the "unacceptable danger" which exists in such a case "that the trier of fact will have regarded the two [factors] . . . as 'intertwined' and have rested the conviction on both together," *id.* at 588. That danger is all the more inescapable under a capital sentencing procedure which requires the jury to consider together all aggravating and mitigating factors, to weigh and evaluate them as a totality.[49]

Petitioner's second argument is comprised of several insufficient parts. He focuses primarily on the Court of Appeals' remark in its initial opinion, that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of [Stephens] which otherwise would not have been before it," Pet. Br., at 10-11. Petitioner is correct that while the Georgia Legislature did not choose to make prior felony convictions a statutory aggravating circumstance, Georgia law does permit

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[49]It is foreign to the entire nature of capital jury deliberations to suggest, as *amicus curiae* The Washington Legal Foundation, intimates, that in a capital case, "the trier of fact considered each count on its own merits and separately from the others," WLF Br. at 11, citing *Street v. New York, supra*, 394 U.S. at 588. The capital jury's mandate is precisely to the contrary.

the introduction of evidence of them during capital sentencing proceedings.[50] However, the Court of Appeals' decision below is not founded on the receipt of allegedly improper evidence, and the now-corrected misstatement in its original opinion is therefore unimportant. As that court indicated from the outset (J.A. 91), and made explicit on rehearing (J.A. 95-96), the principal constitutional infirmity in Stephens' case is that "[t]he instruction on the invalid circumstance may have *directed the jury's attention*" (J.A. 91) or "unduly directed the jury's attention" (J.A. 95) to his prior convictions.

Petitioner dismisses this latter concern, contending that "because the evidence submitted in support of [the unconstitutional aggravating circumstance] . . . was admissible evidence," Pet. Br. at 12, the judge's charge to the jury to consider it as an aggravating circumstance "work[ed] absolutely no effect upon the jury's process of deliberation in reaching their recommendation" of death, Pet. Br. at 13. Viewed as a statement of fact, this contention is without foundation: The jury's written verdict states that it did find the unconstitutional circumstance, together with two others; the record contains no indication of the extent of its influence on the jury. Viewed as surmise, petitioner's contention runs counter to this Court's long-held and well-grounded assumptions that "under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with

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[50] Although the constitutionality of such a practice is not free from doubt, it is not an issue in this case. *Cf. Henry v. Wainwright*, 661 F.2d 56, 58 (5th Cir. 1981), (the practice of "permitting consideration of nonstatutory aggravating factors violates the eight and fourteenth amendments because it fails adequately to channel the jury's discretion in determining whether to impose the death penalty").

deference, and may prove controlling," *Starr v. United States,* 153 U.S. 614, 626 (1894). " '[T]he very purpose' of a jury instruction is to direct the jurors' attention to important legal concepts," *Carter v. Kentucky,* 450 U.S. 288, 299 (1981); "it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it," *Bollenbach v. United States,* 326 U.S. 607, 613 (1946).

Petitioner offers no plausible explanation for the place of jury instructions in capital sentencing proceedings if not to focus and direct the jury's attention on those factors the legislature has deemed of special significance.[51] Objective jury guidance is the central message of *Furman*, the central procedural safeguard endorsed in *Gregg*. Petitioner discusses neither case; indeed, he conspiciously avoids dealing at all with the Eighth Amendment foundations of the Court of Appeals' decision.

The Attorneys General appearing as *amici curiae*, however, do attempt to fashion a theory which would reconcile the strict procedural demands of the Eighth Amendment with the inescapable fact that Stephens' jury was erroneously instructed. Their theory requires a reinterpretation of the entire nature of the capital sentencing process as described by this Court in its prior opinions and as expounded by almost every

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[51] *Amici curiae* appear to suggest that "the argument of counsel" might result in focusing on the jury's attention on the appropriate legislative criteria (Atty. Gen. Br., at 18). As noted above (p. 14, *supra*), the State failed to transcribe the arguments of counsel, so the effect of arguments of counsel in this instance can never be known. In any case, the Court has often noted that "[i]t [is] . . . the duty of the court to safeguard [a] petitioner's rights, a duty only it could have performed reliably," *Taylor v. Kentucky*, 436 U.S. 487, 489 (1978). Stephens' right to jury deliberations conducted in compliance with the Constitution "cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate . . . than the prosecutor," *id.*

state court which has addressed the question. This radical reinterpretation requires the *amici* to postulate "two entirely different meanings" for the term "aggravating circumstances," as employed in state capital statutes, the different meanings varying "according to the context in which [they are] . . . used," Atty. Gen. Br., at 12.[5] The crux of *amici*'s new theory is that:

> "[t]he sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing deliberation, whether the death penalty *may* be imposed . . . Once this determination is made (and assuming that an aggravating circumstance is found) the issue is whether the death penalty *should* be imposed, and the language of the statutory aggravating circumstances have nothing to do with this question."

Atty. Gen. Br., at 13 (emphasis in original).

If these *amici* are correct, it is extraordinary that this Court, in its many cases analyzing capital sentencing procedures since 1976, has never perceived the point—indeed, that the Court has often those procedures in a fashion which is wholly inconsistent with the *amici*'s theory (see discussion, *supra*, pp. 22-30). It is even more extraordinary that state supreme courts have not described their own capital statutes in this fashion, and have not required trial courts to give jury instructions which impart this view of the jury's sentencing responsibilities. (Stephens' jury was not so instructed, of course.) *Amici*'s theory also raises a host of unanswerable questions about current capital sentencing practices. Why do prosecutors request a charge on more than one aggravating circumstance in cases where the evidence supporting one

[5]The Attorneys General confess that "[t]he ambiguity in the term" which is made necessary by their novel theory is present "in the laws of many states," Atty. Gen. Br., at 12 n.5, but it locates one statute—that of the State of Delaware—whose use of the term arguably coincides with that the Attorneys General now propose to adopt. *Id.*

factor (such as Stephens' escape from custody) is undisputed? Why are capital juries required to return verdicts indicating *each* aggravating circumstance found, rather than a single "threshold" circumstance? Why have so many state appellate courts, faced with one invalid circumstance in cases where multiple circumstances were found by the jury—agreed that the proper course is to vacate the death sentence imposed?

In truth, *amici*'s elaborate theory has been constructed in phantasmagoria. It does not reflect the way in which capital statutes have been understood by the legislatures that have drafted them, by the judges that have interpreted them, or by the juries that have applied them. *Amici*'s tortuous efforts simply demonstrate that there is no plausible way to reconcile the Eighth Amendment's procedural demands with a death sentence imposed in reliance upon unconstitutional sentencing instructions.

Petitioner (Pet. Br., at 12) and *amici curiae* (Atty. Gen. Br., at 18; WLF Br., at 13, 15) launch one additional, alternative attack, condemning the Court of Appeals for "attempt[ing] . . . to retrospectively enter the jury room and speculate whether or not the jury's deliberations were correctly concluded," Atty. Gen. Br., at 18. Yet, surely it is these parties who are asking the Court to speculate—to indulge in the sheer conjecture that the improper instruction given Stephens' jury made no difference, that Stephens would inevitably have received a death sentence without it. The Court of Appeals, acting faithfully to this Court's "settled principle . . . that the death penalty may not be imposed under sentencing procedures that create a substantial risk" of arbitrariness (J.A. 90), declined the invitation to engage in these conjectures. Instead, it properly held that Stephens should at last be given the right to which the Eighth and Four-

teenth Amendments[53] entitled him from the outset: a fair determination by a jury, instructed in compliance with Georgia law, of the question whether he will live or die.

The "policy" arguments put forward by *amici curiae* in closing (Atty. Gen. Br., 19-23; WLF Br. 15-20) merit scant response. The Court well understands that it sits to decide cases, not to "send messages" in response to the popular will.[54] The Court has carefully fashioned a system of procedural protections in capital cases, mindful of the needs to protect both individual defendants and society. The trial court in Stephens' case unmistakably violated those pro-

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[53]The Attorneys General appearing as *amici curiae* have also raised the perplexing claim that, since "the sentencing of respondent was totally in compliance with the procedural requirements stated in the decisions in this Court," Atty. Gen. Br., at 18, the issues before this court "do not impinge upon federal constitutional rights" and thus lie "far beyond the scope of legitimate review in an appeal from the denial of a federal habeas petition" (*id.*).

What the Attorneys General mean by "totally in compliance with procedural requirements" is unclear; no party has ever disputed that Stephens' jury received a jury instruction held to have been unconstitutionally vague. Stephens' discussion of both the Eighth Amendment violation (see pp. *supra*) and the independent Fourteenth Amendment violation (see pp. *supra*) occasioned by submission of this erroneous jury instruction clearly suffices to demonstrate a constitutional basis for federal habeas corpus review. The State of Georgia has at no point during these proceedings ever asserted the defense that Stephens was raising noncognizable, non-constitutional claims.

[54]Those Attorneys General who have accused the Court of Appeals of adherence to "technical legal niceties which have no reasonable relation to the validity of the sentencing process," (Atty. Gen. Br., at 8)—and the Washington Legal Foundation, which speaks repeatedly of "an all-knowing, over-arching Federal judiciary" (WLF Br. at 7; see 20)—ought at least to have fully revealed the extent to which state supreme courts have joined in the judgment of the Court of Appeals before they so vigorously lambasted the federal bench.

cedures by injecting an impermissible consideration into the jury's deliberations. The Court of Appeals' judgment vacating Stephens' death sentence was the only appropriate constitutional response under the well-defined Eighth Amendment and Due Process standards established by this Court.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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